

## ATTACHMENT 1

### Response to Question 5(a-g)

**Question 5:** Please attach a sheet designating contact persons to work with Staff on the issues listed below, including each contact person's (i) name, (ii) title, (iii) mailing address, (iv) telephone number, (v) facsimile number, and (vi) e-mail address, if any:

- 1) issues related to processing this application

Eric J. Branfman  
D. Anthony Mastando  
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP  
3000 K Street, NW, Suite 300  
Washington, D.C. 20007-5116  
(202) 295-8321 (Tel.)  
(202) 424-7645 (Fax)  
E-mail: DAMastando@swidlaw.com

with a copy to:

Thomas Lyle, Regulatory Affairs Manager  
Vitts Networks, Inc.  
77 Sundial Avenue  
Manchester, NH 03103  
(603) 656-8000 (Tel.)  
(603) 656-8100 (Fax)  
Email: tlyle@vitts.com

- 2) consumer issues

Thomas Lyle, Regulatory Affairs Manager  
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- 3) customer complaint resolution

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- 4) technical and service quality issues

Bruce Dyke, Vice President of Support and Data Services  
Vitts Networks, Inc.  
77 Sundial Avenue  
Manchester, NH 03103  
(603) 656-8000 (Tel.)  
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Email: [bdyke@vitts.com](mailto:bdyke@vitts.com)

and

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- 5) "tariff" and pricing issues

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- 6) 9-1-1 issues

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- 7) security/law enforcement

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**ATTACHMENT 2**

**Certificate of Incorporation and  
Certificate of Authority to Transact Business in Illinois**

Vitts is in the process of applying for a Certificate of Authority and will submit it under separate cover as soon as it becomes available.

State of Delaware  
Office of the Secretary of State

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PAGE 1

I, EDWARD J. FREEL, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED ARE TRUE AND CORRECT COPIES OF ALL DOCUMENTS FILED FROM AND INCLUDING THE RESTATED CERTIFICATE OF "VITTS NETWORKS, INC." AS RECEIVED AND FILED IN THIS OFFICE.

THE FOLLOWING DOCUMENTS HAVE BEEN CERTIFIED:

RESTATED CERTIFICATE, FILED THE TWENTY-FIFTH DAY OF JUNE, A.D. 1999, AT 1:30 O'CLOCK P.M.



A handwritten signature in cursive script, reading "Edward J. Freel", is written over a horizontal line.

Edward J. Freel, Secretary of State

2654103 8100X

001026352

AUTHENTICATION: 0205122

DATE: 01-18-00

## AMENDED AND RESTATED CERTIFICATE OF INCORPORATION

## OF

## VITTS NETWORKS, INC.

Vitts Networks, Inc., a corporation organized and existing under the General Corporation Law of the State of Delaware, does hereby certify:

1. The original Certificate of Incorporation was filed with the Secretary of State on August 19, 1996, under the name of Vitts Corporation.

2. The following Amended and Restated Certificate of Incorporation was duly proposed by the corporation's Board of Directors pursuant to the applicable provisions of Section 242 and Section 245 of the General Corporation Law of the State of Delaware. In lieu of a meeting of the stockholders, written consent has been given for the adoption of said Amended and Restated Certificate of Incorporation and the amendments to be made thereby pursuant to the applicable provisions of Sections 242 and 245 of the General Corporation Law of the State of Delaware.

**FIRST:** The name of the corporation (hereinafter called the "Corporation") is Vitts Networks, Inc.

**SECOND:** The address of the registered office of the Corporation in the State of Delaware is 1013 Centre Road, Wilmington, County of New Castle, Delaware 19805, and the name of the registered agent of the Corporation in the State of Delaware at such address is Corporation Service Company.

**THIRD:** The purpose of the Corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of the State of Delaware (the "Delaware General Corporation Law").

**FOURTH:** At the time of filing of this Amended and Restated Certificate of Incorporation (the "Certificate of Incorporation") with the Secretary of State of Delaware, the following action shall take effect: each of the 1,200,000 shares of Common Stock issued and outstanding prior to the date of filing of this Amended and Restated Certificate of Incorporation shall be subdivided into an aggregate of 4,800,000 shares of Common Stock, to effect a 4-to-1 stock split of the issued and outstanding Common Stock, and all outstanding options, warrants or other rights to purchase or acquire Common Stock shall be appropriately adjusted for such 4:1 stock split. All numbers herein reflect the 4:1 stock split.

The Corporation is authorized to issue two classes of shares of capital stock to be designated respectively Preferred Stock ("Preferred Stock") and Common Stock ("Common Stock"). The total number of shares of capital stock that the Corporation is authorized to issue is 100,000,000 shares of capital stock. The total number of shares of Preferred Stock that the

Corporation is authorized to issue is 25,000,000 of Preferred stock. The total number of shares of Common Stock that the Corporation is authorized to issue is 75,000,000 of Common Stock. The Preferred Stock and the Common Stock each shall have a par value of \$0.01 per share.

Subject to Section 6 of Part C of this Article Fourth, but notwithstanding the provisions of Section 242(b)(2) of the General Corporation Law of the State of Delaware, the holders of Common Stock shall vote together with the holders of the Preferred Stock as a single class with respect to any proposed amendment hereto that would increase the number of authorized shares of Common Stock or Preferred Stock, with each such share being entitled to such number of votes per share as is provided in this Article Fourth, and the holders of the Common Stock and the Preferred Stock shall not be entitled to separate class votes with respect thereto.

A. Common Stock.

1. Relative Rights of Preferred Stock and Common Stock. All preferences, voting powers, relative, participating, optional or other special rights and privileges, and qualifications, limitations, or restrictions of the Common Stock are expressly made subject and subordinate to those that may be fixed with respect to any shares of any series of the Preferred Stock.

2. Voting Rights. Except as otherwise required by law or the Certificate of Incorporation, each holder of Common Stock shall have one vote in respect of each share of stock held by such stockholder of record on the books of the Corporation for the election of directors and on all matters submitted to a vote of stockholders of the Corporation. Except as otherwise set forth in this Amended and Restated Certificate of Incorporation, any amendment or restatement thereof, or in any Certificate of Designation filed in accordance with the General Corporation Law of the State of Delaware with respect to the designation of any series of Preferred Stock, the holders of Common Stock and Preferred Stock shall vote together (or render written consents in lieu of a vote) as a single class on all matters submitted to the stockholders for a vote.

3. Dividends. Subject to the preferential rights of the Preferred Stock, if any, the holders of shares of Common Stock shall be entitled to receive, when, as and if declared by the Board of Directors of the Corporation, out of the assets of the Corporation which are by law available therefor, dividends payable either in cash, in property or in shares of capital stock.

4. Dissolution, Liquidation or Winding Up. In the event of any dissolution, liquidation or winding up of the affairs of the Corporation, after distribution in full of the preferential amounts, if any, to be distributed to the holders of shares of the Preferred Stock, the holders of Common Stock shall be entitled to receive all of the remaining assets of the Corporation of whatever kind available for distribution to stockholders ratably in proportion to the number of shares of Common Stock held by them respectively, unless otherwise provided by law or the Certificate of Incorporation, any amendment or restatement thereof, or in any Certificate of Designation filed in accordance with the General Corporation Law of the State of Delaware with respect to the designation of any series of Preferred Stock.

### B. Preferred Stock.

The Preferred Stock shall be divided into series. The first series shall consist of 4,403,540 shares and be designated "Series A Preferred Stock."

Subject to the limitations prescribed by law and the provisions of the Certificate of Incorporation, as amended from time to time, the remaining shares of Preferred Stock may be issued from time to time in one or more series and the Board of Directors of the Corporation (the "Board of Directors") is expressly authorized to provide for the issuance of all or any of the remaining shares of the Preferred Stock in one or more series, and to fix the number of shares and to determine or alter, for each such series, such voting powers, full or limited, or no voting powers, and such designations, preferences, and relative, participating, optional, or other rights and such qualifications, limitations, or restrictions thereof, as shall be stated and expressed in the resolution or resolutions adopted by the Board of Directors providing for the issue of such shares (a "Preferred Stock Designation") and as may be permitted by the Delaware General Corporation Law. Subject to the limitations prescribed by law and the provisions of the Certificate of Incorporation, as amended from time to time, the Board of Directors is also expressly authorized to increase or decrease (but not below the number of shares of such series then outstanding) the number of shares of any series other than the Series A Preferred Stock subsequent to the issue of shares of that series. In case the number of shares of any such series shall be so decreased, the shares constituting such decrease shall resume the status that they had prior to the adoption of the resolution originally fixing the number of shares of such series. The Board of Directors of the Corporation is expressly authorized by a vote of all of the members of the Board of Directors then in office, subject to the limitations prescribed by law and the provisions of the Certificate of Incorporation, as amended from time to time, to provide by adopting a vote or votes, a certificate of which shall be filed in accordance with the General Corporation Law of the State of Delaware, for the issue of the Preferred Stock or one or more classes or series, each with the designations, rights and privileges that shall be stated in the vote or votes creating such classes or series. The authority of the Board of Directors of the Corporation with respect to each such class or series of Preferred Stock shall include, without limitation of the foregoing, the right to determine and fix:

1. The distinctive designation of such class or series and the number of shares to constitute such class or series;
2. The rate at which dividends on the shares of such class or series shall be declared and paid, or set aside for payment, whether dividends at the rate so determined shall be cumulative, and whether the shares of such class or series shall be entitled to any participating or other dividends in addition to dividends at the rate so determined, and if so on what terms;
3. The right, if any, of the Corporation to redeem shares of the particular class or series and, if redeemable, the price, terms and manner of such redemption;
4. The special and relative rights and preferences, if any, and the amount or amounts per share, which the shares of such class or series shall be entitled to receive upon any voluntary or involuntary liquidation, dissolution or winding up of the Corporation;

5. The terms and conditions, if any, upon which shares of such class or series shall be convertible into, or exchangeable for, shares of stock, or any other class or classes, including the price or prices or the rate or rates of conversion or exchange and the terms of adjustment, if any;

6. The obligation, if any, of the Corporation to retire or purchase shares of such class or series pursuant to a sinking fund or fund of a similar nature or otherwise, and the terms and conditions of such obligation;

7. Voting rights, if any, including special voting rights with respect to the election of directors and matters adversely affecting any such class or series;

8. Limitations, if any, on the issuance of additional shares of such class or series or any shares of any other class or series of Preferred Stock; and

9. Any other preferences, powers, qualifications, special or relative rights and privileges thereof that the Board of Directors of the Corporation may deem advisable and that are not inconsistent with law and the provisions of the Certificate of Incorporation.

C. The powers, preferences, rights, restrictions, and other matters relating to the Series A Preferred Stock are as follows:

1. Dividends.

a. The holders of the Series A Preferred Stock shall be entitled to receive cumulative dividends at the rate of \$0.40878 per share per annum (as adjusted for any stock dividends, combinations, splits or similar events) whether or not earned or declared. Any accumulated dividends shall bear interest at the rate of 9.0% compounded annually. Such dividends and interest thereon shall be payable in cash (i) when, as, and if declared by the Board of Directors, or (ii) upon conversion of all of the Series A Preferred Stock to Common Stock pursuant to Section C.5. below (the "Preferred Stock Conversion"). Notwithstanding the foregoing, no dividends (and no interest thereon) shall be payable upon the Preferred Stock Conversion if such Preferred Stock Conversion occurs on or prior to June 30, 2002.

b. No dividends or distributions of any sort (other than a dividend payable solely in the Common Stock of the Corporation) shall be paid on any Common Stock of the Corporation so long as any shares of Series A Preferred Stock remain outstanding. All numbers relating to calculation of cumulative dividends shall be subject to equitable adjustment in the event of any stock dividend, stock split, combination, reorganization, recapitalization, reclassification or other similar event involving a change in the capital structure of the Series A Preferred Stock.

2. Liquidation Preference.

a. In the event of any liquidation, dissolution or winding up of the Corporation, whether voluntary or involuntary, the holders of the Series A Preferred Stock shall be entitled to receive, prior and in preference to any distribution of any of the assets or surplus



funds of the Corporation to the holders of the Common Stock or other series of Preferred Stock by reason of their ownership thereof, the amount equal to \$4.542 (as adjusted for any stock dividends, combinations, splits or similar events) plus all accrued but unpaid dividends and interest thereon (the "Liquidation Amount") for each share of Series A Preferred Stock then held by them. If upon the occurrence of such event, the assets and funds thus distributed among the holders of the Series A Preferred Stock shall be insufficient to permit the payment to such holders of the full Liquidation Amount, then the entire assets and funds of the Corporation legally available for distribution shall be distributed ratably among the holders of the Series A Preferred Stock in proportion to the aggregate Liquidation Amount each such holder is otherwise entitled to receive. The holders of Series A Preferred Stock shall have the right to convert such shares into Common Stock, in accordance with Section 5 hereof, at any time prior to or in connection with any liquidation, dissolution or winding up of the Corporation.

b. After payment to the holders of the Series A Preferred Stock of the amounts set forth in Section C.2.a. above, the entire remaining assets and funds of the Corporation legally available for distribution, if any, shall be distributed among the holders of the Common Stock in proportion to the shares of Common Stock then held by them.

c. For purposes of this Section C.2, upon the written consent or written agreement of holders of at least a majority of the shares of Series A Preferred Stock then outstanding, (i) any acquisition of the Corporation by means of merger or other form of corporate reorganization in which outstanding shares of the Corporation are exchanged for securities or other consideration issued or paid, or caused to be issued or paid, by the acquiring entity or its subsidiary (other than a mere reincorporation transaction) or (ii) a sale, lease or conveyance of all or substantially all of the assets of the Corporation (upon such written consent or written agreement, each event described in (i) and (ii), a "Corporate Transaction"), shall be treated as a liquidation, dissolution or winding up of the Corporation and shall entitle the holders of Series A Preferred Stock to receive at the closing of such Corporate Transaction in cash, securities or other property (valued as provided in Section C.2.d. below) amounts as specified in Section C.2.a. above. The provisions of this Section 2 shall not apply to any reorganization, merger or consolidation involving (1) only a change in the state of incorporation of the Corporation, (2) a merger of the Corporation with or into a wholly-owned subsidiary of the Corporation that is incorporated in the United States of America, or (3) an acquisition by merger, reorganization or consolidation, of which the Corporation is substantively the surviving corporation and operates as a going concern and is not the target in any such acquisition, of another corporation that is approved by the Board of Directors of the Corporation with a majority of the Series A Directors concurring and which does not involve a recapitalization of the Series A Preferred Stock.

d. Whenever the distribution provided for in this Section C.2 shall be payable in securities or property other than cash, the value of such distribution shall be the fair market value of such securities or other property as determined in good faith by the Board of Directors. The Liquidation Amount shall in all events be paid in cash; provided, however, that if the Liquidation Amount is otherwise payable in connection with a consolidation or merger of the Corporation, or sale of substantially all of the capital stock of the Corporation, then each holder of the Series A Preferred Stock shall receive payments with respect to the Series A Preferred Stock in the same form of consideration as is payable with respect to the Common Stock. In the

event of any business combination or acquisition involving the Corporation which is intended to be treated as a "pooling of interests" for accounting purposes under Accounting Principles Board Opinion No. 16, the acquisition consideration (including any shares of capital stock or other securities to be delivered or exchanged by the acquiring corporation) shall be reallocated among the holders of Series A Preferred Stock in an appropriate manner to give economic effect to the essential intent and purposes of Section 2(a) and (c).

3. Redemption.

a. At any time after June 30, 2004, the holders of a majority of the outstanding shares of Series A Preferred Stock shall have the option to require the Corporation to redeem (a "Mandatory Redemption") all, but not less than all, of the Series A Preferred Stock held by such holders at a price per share of Series A Preferred Stock equal to the greater of (i) the Liquidation Amount or (ii) an amount equal to the fair market value per share of Series A Preferred Stock, such value to be determined by an independent appraisal (the "Appraisal"), exclusive of liquidity or minority ownership discounts, performed by an independent third party mutually agreeable to such holder and the Corporation. The expense of the Appraisal shall be borne equally by the Corporation and the redeeming holder. A holder of shares of Series A Preferred Stock may require the Corporation to make a Mandatory Redemption by giving written notice (the "Redemption Notice") to the Corporation of such election. Upon the later of (i) 45 days after receipt of such Redemption Notice, or (ii) 10 days after the Appraisal is complete (the "Mandatory Redemption Date"), the Corporation (and such holder) will be obligated to redeem, to the extent it may lawfully do so, all of such holder's Series A Preferred Stock.

b. To the extent legally permissible, amounts to be paid pursuant to any Mandatory Redemption shall be paid in cash to the extent of 50% of aggregate cash provided by operating activities of the Corporation (as determined in accordance with generally accepted accounting principles) for the four fiscal quarters immediately preceding the fiscal quarter in which the applicable Redemption Notice is received by the Corporation and the balance shall be paid in the form of a two year promissory note payable in equal quarterly installments and bearing simple interest of 8% per annum. Any amounts due and unpaid under such promissory note shall thereafter bear simple interest at 14% per annum. Notwithstanding anything herein to the contrary, in no event shall such interest exceed the maximum rate allowable under applicable law.

c. If the funds of the Corporation legally available for redemption of Series A Preferred Stock on any Mandatory Redemption Date and specified in Section C.3.b. above are insufficient to redeem the total number of shares of Series A Preferred Stock to be redeemed on such Mandatory Redemption Date, those funds that are legally available shall be used to redeem the maximum possible number of shares of Series A Preferred Stock ratably among the holders of such shares to be redeemed on the basis of the redemption amounts due with respect to the shares held by each such holder. At any time and from time to time thereafter when additional funds of the Corporation are legally available for redemption of shares of Series A Preferred Stock such funds shall be used to immediately redeem, in accordance with Section C.3.b. above, the balance of the shares which the Corporation has become obligated to redeem on any Mandatory Redemption Date but which it has not redeemed. Such shares shall be

redeemed ratably among the holders of such shares to be redeemed on the basis of the redemption amounts due with respect to the balance of the shares held by each such holder which the Corporation became obligated to redeem on such Mandatory Redemption Date but which have not been redeemed. Such funds shall not be used for any other purpose, including to redeem any shares of Series A Preferred Stock which the Corporation is obligated to redeem on any subsequent date.

d. Notwithstanding anything to the contrary herein or in the Corporation's Bylaws, if the Corporation does not redeem all Series A Preferred Stock to be redeemed on a Mandatory Redemption Date (whether due to lack of legally available funds or otherwise) then during the period from the Mandatory Redemption Date until such Series A Preferred Stock is redeemed (the "Board Control Period"), the Corporation's Board of Directors shall be constituted as follows: The Board of Directors shall consist of seven members. Four directors (the "Series A Directors") shall be elected by a plurality vote of the holders of shares of Series A Preferred Stock, voting as a separate class. Three directors (the "Common Directors") shall be elected by a plurality vote of the shares of Common Stock, voting as a separate class. The holders of a majority of the shares of Series A Preferred Stock may remove Series A Director(s) and appoint new Series A Director(s) to fill any vacancies by written notice delivered to the Corporation. The holders of a majority of the shares of Common Stock may remove Common Director(s) and appoint new Common Director(s) to fill any vacancies by written notice delivered to the Corporation. Vacancies may not be filled in any other manner. Upon termination of the Board Control Period, the most recently elected Series A Director shall resign and the Common Directors may appoint a director to fill the such vacancy.

#### 4. Voting Rights.

a. Each holder of shares of Series A Preferred Stock shall be entitled to the number of votes equal to the number of whole shares of Common Stock into which such shares of Series A Preferred Stock could be converted and shall have voting rights and powers equal to the voting rights and powers of such Common Stock (except as otherwise expressly provided herein, voting together with the Common Stock as a single class) and shall be entitled to notice of any stockholders' meeting in accordance with the Bylaws of the Corporation and the Delaware General Corporation Law. Fractional votes shall not, however, be permitted and any fractional voting rights resulting from the above formula (after aggregating all shares into which shares of Series A Preferred Stock held by each holder could be converted) shall be rounded to the nearest whole number (with one-half being rounded upward). Such determination of "whole shares" shall be based upon the aggregate number of shares of Series A Preferred Stock held by each holder, and not upon each share of Series A Preferred Stock so held by the holder. Each holder of Common Stock shall be entitled to one vote for each share of Common Stock held. Except as otherwise expressly provided in this Amended and Restated Certificate of Incorporation, the holders of shares of Series A Preferred Stock and Common Stock shall vote together (or render written consents in lieu of a vote) as a single class on all matters submitted to the stockholders of the Corporation.

b. Until consummation of a Qualified Public Offering (as defined below) and unless otherwise agreed by the holders of a majority of the Series A Preferred Stock,

the Corporation's Board of Directors shall be constituted as follows: The Board of Directors shall consist of seven members. Three directors (the "Series A Directors") shall be elected by a plurality vote of the holders of shares of Series A Preferred Stock, voting as a separate class. Four directors (the "Common Directors") shall be elected by a plurality vote of the shares of Common Stock, voting as a separate class. The holders of a majority of the shares of Series A Preferred Stock may remove Series A Director(s) and appoint new Series A Director(s) to fill any vacancies by written notice delivered to the Corporation. The holders of a majority of the shares of Common Stock may remove Common Director(s) and appoint new Common Director(s) to fill any vacancies by written notice delivered to the Corporation. Vacancies may not be filled in any other manner. This Section 4.b. shall not be operative during a Board Control Period.

5. Conversion. The holders of the Series A Preferred Stock shall have conversion rights as follows (the "Conversion Rights"):

a. Right to Convert. Each share of Series A Preferred Stock shall be convertible, at the option of the holder thereof, at any time at the office of the Corporation or any transfer agent for such stock, into such number of fully paid and nonassessable shares of Common Stock as is determined by dividing \$4.542 by the Conversion Price applicable to such share, determined as hereinafter provided, in effect on the date the certificate is surrendered for conversion. The Conversion Price at which shares of Common Stock shall be deliverable upon conversion of shares of the Series A Preferred Stock (the "Series A Conversion Price") shall initially be \$4.542 per share of Common Stock. Such initial Series A Conversion Price shall be adjusted as hereinafter provided.

b. Automatic Conversion. Each share of Series A Preferred Stock shall automatically be converted into shares of Common Stock at the then effective Series A Conversion Price upon the earliest of (i) the effectiveness of an underwritten public offering on a firm commitment basis pursuant to an effective registration statement filed pursuant to the Securities Act of 1933, as amended, covering the offer and sale of Common Stock for the account of the Corporation and/or selling stockholders in which the Corporation and/or such stockholders actually receive gross proceeds equal to or greater than \$30,000,000 and at a price per share equal to or greater than \$9.09 (adjusted for any stock split, stock dividend, combination or similar event involving a change in the Common Stock), or (ii) the date specified by written consent or written agreement of holders of at least two-thirds of the shares of Series A Preferred Stock then outstanding. The automatic conversion of the Series A Preferred Stock into shares of Common Stock as provided in clause (i) above upon the effectiveness of the registration statement shall be subject in all circumstances to the closing and consummation of the offer and sale of shares of Common Stock pursuant to any public offering satisfying the requirements of clause (i) above.

c. Mechanics of Conversion.

(i) Before any holder of Series A Preferred Stock shall be entitled to convert the same into shares of Common Stock, he shall surrender the certificate or certificates therefor, duly endorsed, at the office of the Corporation or of any transfer agent for such stock, and shall give written notice to the Corporation at such office that he elects to convert

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the same and shall state therein the name or names in which he wishes the certificate or certificates for shares of Common Stock to be issued. The Corporation shall, as soon as practicable thereafter, issue and deliver at such office to such holder of Series A Preferred Stock, a certificate or certificates for the number of shares of Common Stock to which he shall be entitled as aforesaid. Such conversion shall be deemed to have been made immediately prior to the close of business on the date of surrender of the shares of Series A Preferred Stock to be converted, and the person or persons entitled to receive the shares of Common Stock issuable upon such conversion shall be treated for all purposes as the record holder or holders of such shares of Common Stock on such date. Upon the occurrence of the conversion events specified in the preceding paragraph (i), the holders of the Series A Preferred Stock shall, upon notice from the Corporation, surrender the certificates representing such shares at the office of the Corporation or of its transfer agent for the Common Stock. Thereupon, there shall be issued and delivered to such holder a certificate or certificates for the number of shares of Common Stock into which the shares of Series A Preferred Stock so surrendered were convertible on the date on which such conversion occurred. The Corporation shall not be obligated to issue such certificates unless certificates evidencing the shares of Series A Preferred Stock being converted are either delivered to the Corporation or any such transfer agent, or the holder notifies the Corporation that such certificates have been lost, stolen or destroyed and executes an agreement reasonably satisfactory to the Corporation to indemnify the Corporation from any loss incurred by it in connection therewith.

(ii) If the conversion is in connection with an underwritten offering of securities pursuant to the Securities Act or other event regarding which notice is provided pursuant to Section C.5.i. (collectively, a "Contingent Event"), the conversion may, at the option of any holder tendering shares of Series A Preferred Stock for conversion, be conditioned upon the closing with the underwriters of the sale of securities pursuant to such offering or the occurrence of such Contingent Event, in which event the person(s) entitled to receive the Common Stock upon conversion of the Series A Preferred Stock shall not be deemed to have converted such Series A Preferred Stock until immediately prior to the closing of such sale of securities or Contingent Event.

d. Adjustments to Series A Conversion Price for Certain Diluting Issues.

(i) Special Definitions. For purposes of this Section C.5.d., the following definitions apply:

(1) "Options" shall mean rights, options, or warrants to subscribe for, purchase or otherwise acquire either Common Stock or Convertible Securities (defined below).

(2) "Original Issue Date" shall mean the date on which a share of Series A Preferred Stock was first issued.

(3) "Convertible Securities" shall mean any evidences of indebtedness, shares (other than Common Stock and Series A Preferred Stock) or other securities convertible into or exchangeable for Common Stock.

(4) "Additional Shares of Common Stock" shall mean all shares of Common Stock issued (or, pursuant to Section C.5.d.(iii), deemed to be issued) by the Corporation after the Original Issue Date, other than shares of Common Stock issued (or deemed issued):

(A) upon conversion of shares of Series A Preferred Stock;

(B) to directors, officers, employees and consultants pursuant to any incentive or non-qualified stock option plan or agreement, stock purchase plan or agreement, stock issuance or restriction agreement, stock ownership or purchase plan, consulting agreement (the "Employee Stock") provided that the number of shares of Employee Stock does not exceed an aggregate of 2,400,000 shares (as adjusted for any stock dividends, combinations, splits or similar events) regardless of whether issued by the Corporation prior to the date hereof or issuable after the date hereof unless additional Employee Stock is approved by a majority of the members of the Board of Directors with a majority of the Series A Directors concurring;

(C) as a dividend or distribution on Series A Preferred Stock;

(D) for which adjustment of the Series A Conversion Price is made pursuant to Section C.5.e.;

(E) in connection with corporate partnering transactions, lease lines, bank financings or acquisitions of businesses or intellectual property rights, provided in each such case that such transaction was approved by the Board of Directors, with a majority of the Purchaser Directors concurring; or

(F) a warrant(s) issued to Jeffries & Company, Inc. (or any affiliated entity) for an aggregate amount of up to 320,650 shares of Common Stock.

(ii) No Adjustment of Series A Conversion Price. Any provision herein to the contrary notwithstanding, no adjustment in the Series A Conversion Price shall be made in respect of the issuance of Additional Shares of Common Stock unless the consideration per share (determined pursuant to Section C.5.d.(v) hereof) for an Additional Share of Common Stock issued or deemed to be issued by the Corporation is less than the Series A Conversion Price in effect on the date of, and immediately prior to such issue. In computing each adjusted Series A Conversion Price, the result shall be rounded to five decimal places, and such adjustment shall be made separately in each instance, and in the event the adjustment therefrom results in a change of the Series A Conversion Price of less than \$0.01, no adjustment to the then Series A Conversion Price shall be made, but the amount of said adjustment calculated thereby shall be carried forward to successive occasions until such adjustments in the aggregate equal or exceed \$0.01.

(iii) Deemed Issue of Additional Shares of Common Stock. In the event the Corporation at any time or from time to time after the Original Issue Date shall

issue any Options or Convertible Securities or shall fix a record date for the determination of holders of any class of securities then entitled to receive any such Options or Convertible Securities, then the maximum number of shares (as set forth in the instrument relating thereto without regard to any provisions contained therein designed to protect against dilution) of Common Stock issuable upon the exercise of such Options or, in the case of Convertible Securities and Options therefor, the conversion or exchange of such Convertible Securities, shall be deemed to be Additional Shares of Common Stock issued as of the time of such issue or, in case such a record date shall have been fixed, as of the close of business on such record date, provided further that in any such case in which Additional Shares of Common Stock are deemed to be issued:

(1) no further adjustments in the Series A Conversion Price shall be made upon the subsequent issue of Convertible Securities or shares of Common Stock upon the exercise of such Options or conversion or exchange of such Convertible Securities;

(2) if such Options or Convertible Securities by their terms provide, with the passage of time or otherwise, for any increase in the consideration payable to the Corporation, or decrease in the number of shares of Common Stock issuable, upon the exercise, conversion or exchange thereof, the Series A Conversion Price computed upon the original issue thereof (or upon the occurrence of a record date with respect thereto), and any subsequent adjustments based thereon, shall, upon any such increase or decrease becoming effective, be recomputed to reflect such increase or decrease insofar as it affects such Options or the rights of conversion or exchange under such Convertible Securities (provided, however, that no such adjustment of the Series A Conversion Price shall affect Common Stock previously issued upon conversion of the Series A Preferred Stock);

(3) no readjustment pursuant to clause (1) or (2) above shall have the effect of increasing the Series A Conversion Price to an amount which exceeds the lower of (a) the Series A Conversion Price on the original adjustment date, or (b) the Series A Conversion Price that would have resulted from any issuance of Additional Shares of Common Stock between the original adjustment date and such readjustment date.

(iv) Adjustment of Series A Conversion Price Upon Issuance of Additional Shares of Common Stock. In the event the Corporation, at any time after the Original Issue Date, shall issue Additional Shares of Common Stock (including Additional Shares of Common Stock deemed to be issued pursuant to Section C.5.d.(iii)) without consideration or for a consideration per share less than the Series A Conversion Price in effect on the date of and immediately prior to such issue, then and in such event, the Series A Conversion Price shall be reduced, concurrently with such issue, to a price (calculated to the nearest cent) determined by multiplying the Series A Conversion Price by a fraction, the numerator of which shall be the number of shares of Common Stock outstanding immediately prior to such issue plus the number of shares of Common Stock which the aggregate consideration received by the Corporation for the total number of Additional Shares of Common Stock so issued would purchase at the Series A Conversion Price in effect immediately prior to such issuance, and the denominator of which shall be the number of shares of Common Stock outstanding immediately prior to such issue plus

the number of such Additional Shares of Common Stock so issued. For the purpose of the above calculation, the number of shares of Common Stock outstanding immediately prior to such issue shall be calculated on a fully diluted basis, as if all shares of Series A Preferred Stock and all Convertible Securities had been fully converted into shares of Common Stock and any outstanding Options or other Convertible Securities had been fully exercised (and the resulting securities fully converted into shares of Common Stock, if so convertible) as of such date. The provisions of this Section 5d may be waived in any instance (without the necessity of convening any meeting of stockholders of the Corporation) upon the written approval of the holders of a majority of the outstanding shares of Series A Preferred Stock.

(v) Determination of Consideration. For purposes of this Section C.5.d., the consideration received by the Corporation for the issue of any Additional Shares of Common Stock shall be computed as follows:

(1) Cash and Property: Such consideration shall:

(A) insofar as it consists of cash, be computed at the aggregate amount of cash received by the Corporation;

(B) insofar as it consists of property other than cash, be computed at the fair value thereof at the time of such issue, as determined in good faith by the Board of Directors; and

(C) in the event Additional Shares of Common Stock are issued together with other shares or securities or other assets of the Corporation for consideration which covers both, be the proportion of such consideration so received in exchange for the Additional Shares of Common Stock, computed as provided in clauses (A) and (B) above, as determined in good faith by the Board of Directors.

Options and Convertible Securities. The consideration per share received by the Corporation for Additional Shares of Common Stock deemed to have been issued pursuant to Section C.5.d.(iii), relating to Options and Convertible Securities shall be determined by dividing

(D) the total amount, if any, received or receivable by the Corporation as consideration for the issue of such Options or Convertible Securities, plus the minimum aggregate amount of additional consideration (as set forth in the instruments relating thereto, without regard to any provision contained therein designed to protect against dilution) payable to the Corporation upon the exercise of such Options or the conversion or exchange of such Convertible Securities, or in the case of Options for Convertible Securities, the exercise of such Options for Convertible Securities and the conversion or exchange of such Convertible Securities by

(E) the maximum number of shares of Common Stock (as set forth in the instruments relating thereto, without regard to any provision contained therein designed to protect against the dilution) issuable upon the exercise of such Options or conversion or exchange of such Convertible Securities.



e. Adjustments to Series A Conversion Price for Stock Dividends and for Combinations or Subdivisions of Common Stock. In the event that the Corporation at any time or from time to time after the Original Issue Date shall effect a (i) subdivision of the outstanding shares of Common Stock into a greater number of shares of Common Stock (by stock dividend, stock split, reclassification or otherwise), or (ii) combination or consolidation of the outstanding shares of Common Stock into a lesser number of shares of Common Stock (by reclassification or otherwise), then the Series A Conversion Price in effect immediately prior to such event shall, concurrently with the effectiveness of such event, be proportionately decreased or increased, as appropriate. In the event that the Corporation shall declare or pay, without consideration, any dividend on the Common Stock payable in Common Stock or in any right to acquire Common Stock for no consideration, then the Corporation shall be deemed to have subdivided the outstanding shares of Common Stock by an amount of shares equal to the maximum number of shares issuable through such dividend and/or upon exercise of such rights to acquire Common Stock.

f. Adjustments to Series A Conversion Price for Reclassification and Reorganization. If the Common Stock issuable upon conversion of the Series A Preferred Stock shall be changed into the same or a different number of shares of any other class or classes of stock, whether by capital reorganization, reclassification or otherwise (other than as provided for in Section C.5.e. above or in connection with a Corporate Transaction), the Series A Conversion Price then in effect shall, concurrently with the effectiveness of such reorganization or reclassification, be proportionately adjusted so that the Series A Preferred Stock shall be convertible into, in lieu of the number of shares of Common Stock which the holders would otherwise have been entitled to receive, a number of shares of such other class or classes of stock equivalent to the number of shares of Common Stock that would have been subject to receipt by the holders upon conversion of the Series A Preferred Stock immediately before that change.

g. No Impairment. The Corporation will not, by amendment of its Certificate of Incorporation or through any reorganization, transfer of assets, consolidation, merger, dissolution, issue or sale of securities or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms to be observed or performed hereunder by the Corporation, but will at all times in good faith assist in the carrying out of all the provisions of this Section C.5 and in the taking of all such action as may be necessary or appropriate in order to protect the Conversion Rights of the holders of the Series A Preferred Stock against impairment.

h. Certificates as to Adjustments. Upon the occurrence of each adjustment or readjustment of the Series A Conversion Price pursuant to this Section C.5, the Corporation at its expense shall promptly compute such adjustment or readjustment in accordance with the terms hereof and prepare and furnish to each holder of Series A Preferred Stock a certificate executed by the Corporation's President or Chief Financial Officer setting forth such adjustment or readjustment and showing in detail the facts upon which such adjustment or readjustment is based. The Corporation shall, upon the written request at any time of any holder of Series A Preferred Stock, furnish or cause to be furnished to such holder a like certificate setting forth (i) such adjustments and readjustments, (ii) the Series A Conversion Price at the time in effect, and (iii) the number of shares of Common Stock and the amount, if any, of

other property which at the time would be received upon the conversion of the Series A Preferred Stock.

i. Notices of Record Date. In the event that the Corporation shall propose at any time to effect any reclassification or recapitalization, to merge or consolidate with or into any other entity, or sell, lease or convey all or substantially all of its assets, or to liquidate, dissolve or wind up, then, in connection with each such event, the Corporation shall send to the holders of Series A Preferred Stock: (1) at least 20 days prior written notice of the date on which a record shall be taken for such event and specifying the date on which such event shall occur; and (2) at least 20 days prior written notice of the record date for determining rights to vote, if any, in respect of such event.

j. Issue Taxes. The Corporation shall pay any and all issue and other taxes that may be payable in respect of any issue or delivery of shares of Common Stock on conversion of shares of Series A Preferred Stock pursuant hereto; provided, however, that the Corporation shall not be obligated to pay any transfer taxes resulting from any transfer requested by any holder in connection with any such conversion.

k. Reservation of Stock Issuable Upon Conversion. The Corporation shall at all times reserve and keep available out of its authorized but unissued shares of Common Stock, solely for the purpose of effecting the conversion of the shares of the Series A Preferred Stock, such number of its shares of Common Stock as shall from time to time be sufficient to effect the conversion of all outstanding shares of the Series A Preferred Stock; and if at any time the number of authorized but unissued shares of Common Stock shall not be sufficient to effect the conversion of all then outstanding shares of the Series A Preferred Stock, the Corporation shall take such corporate action as may, in the opinion of its counsel, be necessary to increase its authorized but unissued shares of Common Stock to such number of shares as shall be sufficient for such purpose, including, without limitation, engaging in best efforts to obtain the requisite stockholder approval of any necessary amendment to this Certificate of Incorporation.

l. Fractional Shares. No fractional share shall be issued upon the conversion of any share or shares of Series A Preferred Stock. All shares of Common Stock (including fractions thereof) issuable upon conversion of more than one share of Series A Preferred Stock by a holder thereof shall be aggregated for purposes of determining whether the conversion would result in the issuance of any fractional share. If, after the aforementioned aggregation, the conversion would result in the issuance of a fraction of a share of Common Stock, the Corporation shall, in lieu of issuing any fractional share, pay the holder otherwise entitled to such fraction a sum in cash equal to the fair market value of such fraction on the date of conversion (as determined in good faith by the Board of Directors).

m. Notices. Any notice required by the provisions of this Section C.5 to be given to the holders of shares of Series A Preferred Stock shall be deemed given if deposited in the United States mail, postage prepaid, and addressed to each holder of record at his address appearing on the books of the Corporation.

6. Restrictions and Limitations.

a. So long as any shares of Series A Preferred Stock remain outstanding, in addition to any other vote required by the Delaware General Corporation Law, the vote or written consent or written agreement of the holders of at least a majority of the then outstanding shares of the Series A Preferred Stock, voting as a separate class, shall be required in order to:

(vi) alter the rights, preferences or privileges of the Series A Preferred Stock;

(vii) increase the authorized number of shares of the Series A Preferred Stock;

(viii) authorize or issue, or obligate itself to issue, any other equity security (including any security convertible into or exercisable for any equity security) senior to or on a parity with the Series A Preferred Stock as to dividend rights, liquidation preferences or redemption rights; or

(ix) redeem, purchase or otherwise acquire any shares of Common Stock or Preferred Stock (or pay into a sinking fund for such purpose); provided however that this restriction shall not apply to any redemption pursuant to Section C.3 or to the repurchase of shares of Common Stock at the original purchase price from employees, officers, directors or other persons performing services for this Corporation.

b. So long as any shares of Series A Preferred Stock remain outstanding, in addition to any other vote required by the Delaware General Corporation Law, the vote or written consent or written agreement of the holders of at least a majority of the then outstanding shares of the Series A Preferred Stock (on an as converted basis) and Common Stock, voting together as a single class, shall be required in order to merge or consolidate with or into any other entity or sell or convey any substantial portion of the Corporation's assets. Notwithstanding the foregoing and prior to December 31, 2000, if any such merger, consolidation, sale or conveyance would result in holders of Series A Preferred Stock receiving less than \$13.626 per share (as adjusted for any stock dividend, stock split, reclassification or similar events), the vote or written consent or written agreement of the holders of at least a majority of the then outstanding shares of Series A Preferred Stock shall be required in order to effect such transaction.

7. No Reissuance of Series A Preferred Stock. No share or shares of Series A Preferred Stock acquired by the Corporation by reason of redemption, purchase, conversion or otherwise shall be reissued, and all such shares shall be cancelled, retired and restored to the status of undesignated Preferred Stock.

**FIFTH:** The Corporation reserves the right to adopt, repeal, rescind or amend in any respect any provisions contained in this Certificate of Incorporation in the manner now or hereafter prescribed by applicable law and in accordance with the terms of the Certificate of Incorporation, and all rights conferred on stockholders herein are granted subject to this reservation.

**SIXTH:** The management of the business and the conduct of the affairs of the Corporation shall be vested in the Corporation's Board of Directors. The number of directors constituting the whole Board of Directors shall be fixed by, or in the manner provided in, the Bylaws of the Corporation.

**SEVENTH:** Elections of directors need not be by written ballot unless the Bylaws of the Corporation shall so provide.

**EIGHTH:** The Corporation eliminates the personal liability of each member of its Board of Directors to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that the foregoing shall not eliminate the liability of a director (i) for any breach of such director's duty of loyalty to the Corporation or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) under Section 174 of Title 8 of the Delaware Code, or (iv) for any transaction from which such director derived an improper personal benefit. If the Delaware General Corporation Law is amended in the future to authorize corporate action further eliminating or limiting the personal liability of directors, then the liability of a director of the Corporation shall be eliminated or limited to the fullest extent permitted by the Delaware General Corporation Law, as so amended from time to time. Neither any amendment nor repeal of this Article EIGHTH, nor the adoption of any provision of this Certificate of Incorporation inconsistent with this Article EIGHTH, shall eliminate or reduce the effect of this Article EIGHTH in respect of any matter occurring, or any cause of action, suit or claim that, but for this Article EIGHTH, would accrue or arise, prior to such amendment, repeal or adoption of an inconsistent provision.

**NINTH:** A director of the Corporation shall, to the full extent permitted by the Delaware General Corporation Law as it now exists or as it may hereafter be amended, be indemnified and held harmless by the Corporation, as hereinafter provided in Article Fourteen. Neither any amendment nor repeal of this Article NINTH, nor the adoption of any provision of this Certificate of Incorporation inconsistent with this Article NINTH, shall adversely affect any right or protection of a director in respect of any matter occurring, or any cause of action, suit or claim arising out of any matter occurring, prior to such amendment, repeal or modification.

**TENTH:** In furtherance and not in limitation of the powers conferred by statute, the Board of Directors shall have the power, both before and after receipt of any payment for any of the Corporation's capital stock, to adopt, amend, repeal or otherwise alter the Bylaws of the Corporation without any action on the part of the stockholders; provided, however, that the grant of such power to the Board of Directors shall not divest the stockholders of nor limit their power to adopt, amend, repeal or otherwise alter the Bylaws.

**ELEVENTH:** The Corporation expressly elects not to be governed by Section 203 of the Delaware General Corporation Law.

**TWELFTH:** In furtherance and not in limitation of the powers conferred by the laws of the State of Delaware: Elections of directors need not be by written ballot unless the By-Laws of the Corporation shall so provide. The books of the Corporation may be kept at such

place within or without the State of Delaware as the By-Laws of the Corporation may provide or as may be designated from time to time by the Board of Directors of the Corporation.

Subject to the rights of the holders of any series of Preferred Stock, any vote or votes authorizing liquidation of the Corporation or proceedings for its dissolution may provide, subject to the rights of creditors and the rights expressly provided for particular classes or series of capital stock, for the distribution among the stockholders of the Corporation of the assets of the Corporation as provided herein, wholly or in part or in kind, whether such assets be in cash or other property, and may authorize the Board of Directors of the Corporation to determine the valuation of the different assets of the Corporation for the purpose of such liquidation and may divide or authorize the Board of Directors to divide such assets or any part thereof among the stockholders of the Corporation, in such manner that every stockholder will receive a proportionate amount in value (determined as provided herein) of cash or property of the Corporation upon such liquidation or dissolution even though each stockholder may not receive a strictly proportionate part of each such asset.

**THIRTEENTH:** Whenever a compromise or arrangement is proposed between this Corporation and its creditors or any class of them and/or between this Corporation and its stockholders or any class of them, any court of equitable jurisdiction within the State of Delaware may, on the application in a summary way of this Corporation or of any creditor or stockholder thereof or on the application of any receiver or receivers appointed for this Corporation under the provisions of Section 291 of Title 8 of the Delaware Code or on the application of trustees in dissolution or of any receiver or receivers appointed for this Corporation under the provisions of Section 279 of Title 8 of the Delaware Code, order a meeting of the creditors or class of creditors, and/or of the stockholders or class of stockholders of this Corporation, as the case may be, to be summoned in such manner as the said court directs. If a majority in number representing three-fourths in value of the creditors or class of creditors, and/or of the stockholders or class of stockholders of this Corporation, as the case may be, agree to any compromise or arrangement and to any reorganization of this Corporation as a consequence of such compromise or arrangement, the said compromise or arrangement and the said reorganization shall, if sanctioned by the court to which the said application has been made, be binding on all the creditors or class of creditors, and/or on all the stockholders or class of stockholders, of this Corporation, as the case may be, and also on this Corporation.

**FOURTEENTH:**

1. Actions, Suits and Proceedings Other than by or in the Right of the Corporation. The Corporation shall indemnify each person who was or is a party or is threatened to be made or party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the Corporation), by reason of the fact that he is or was, or has agreed to become, a director or officer of the Corporation, or is, or was serving, or has agreed to serve, at the request of the Corporation, as a director, officer or trustee of, or in a similar capacity with, another corporation, partnership, joint venture, trust or other enterprise (including any employee benefit plan) (all such persons being referred to hereafter as an "Indemnitee"), or by reason of any action alleged to have been taken or omitted in such capacity, against all expenses (including attorneys' fees),

judgments, fines and amounts paid in settlement actually and reasonably incurred by him or on his behalf in connection with such action, suit or proceeding and any appeal therefrom, if he acted in good faith and in a manner he reasonably believed to be in, or not opposed to, the best interests of the Corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he reasonably believed to be in, or not opposed to, the best interests of the Corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that his conduct was unlawful. Notwithstanding anything to the contrary in this Article, except as set forth in Section 7 below, the Corporation shall not indemnify an Indemnitee seeking indemnification in connection with a proceeding (or part thereof) initiated by the Indemnitee unless the initiation thereof was approved by the Board of Directors of the Corporation.

2. Actions or Suits by or in the Right of the Corporation. The Corporation shall indemnify any Indemnitee who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the Corporation to procure a judgment in its favor by reason of the fact that he is or was, or has agreed to become, a director or officer of the Corporation, or is or was serving, or has agreed to serve, at the request of the Corporation, as a director, officer or trustee of, or in a similar capacity with, another corporation, partnership, joint venture, trust or other enterprise (including any employee benefit plan), or by reason of any action alleged to have been taken or omitted in such capacity, against all expenses (including attorneys' fees) and amounts paid in settlement actually and reasonably incurred by him or on his behalf in connection with such action, suit or proceeding and any appeal therefrom, if he acted in good faith and in a manner he reasonably believed to be in, or not opposed to, the best interests of the Corporation, except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable to the Corporation unless and only to the extent that the Court of Chancery of Delaware or the court in which such action or suit was brought shall determine upon application that, despite the adjudication of such liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnify for such expenses (including attorneys' fees) which the Court of Chancery of Delaware or such other court shall deem proper.

3. Indemnification for Expenses of Successful Party. Notwithstanding the other provisions of this Article, to the extent that an Indemnitee has been successful, on the merits or otherwise, in defense of any action, suit or proceeding referred to in Section 1 and 2 of this Article, or in defense of any claim, issue or matter therein, or on appeal from any such action suit or proceeding, he shall be indemnified against all expenses (including attorneys' fees) actually and reasonably incurred by him or on his behalf in connection therewith. Without limiting the foregoing, if any action, suit or proceeding is disposed of, on the merits or otherwise (including a disposition without prejudice), without (i) the disposition being adverse to the Indemnitee, (ii) an adjudication that the Indemnitee was liable to the Corporation, (iii) a plea of guilty or nolo contendere by the Indemnitee, (iv) an adjudication that the Indemnitee did not act in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the Corporation, and (v) with respect to any criminal proceeding, an adjudication that the

Indemnitee had reasonable cause to believe his conduct was unlawful, the Indemnitee shall be considered for the purposes hereof to have been wholly successful with respect thereto.

4. Notification and Defense of Claim. As a condition precedent to his right to be indemnified, the Indemnitee must notify the Corporation in writing as soon as practicable of any action, suit, proceeding or investigation involving him for which indemnity will or could be sought. With respect to any action, suit, proceeding or investigation of which the Corporation is so notified, the Corporation will be entitled to participate therein at its own expense and/or to assume the defense thereof at its own expense, with legal counsel reasonably acceptable to the Indemnitee. After notice from the Corporation to the Indemnitee of its election so to assume such defense, the Corporation shall not be liable to the Indemnitee for any legal or other expense subsequently incurred by the Indemnitee in connection with such claim, other than as provided below in this Section 4. The Indemnitee shall have the right to employ his own counsel in connection with such claim, but the fees the expenses of such counsel incurred after notice from the Corporation of its assumption of the defense thereof shall be at the expense of the Indemnitee unless (i) the employment of counsel by the Indemnitee has been authorized by the Corporation, (ii) counsel to the Indemnitee shall have reasonably concluded that there may be a conflict of interest or position on any significant issue between the Corporation and the Indemnitee in the conduct of the defense of such action, or (iii) the Corporation shall not in fact have employed counsel to assume the defense of such action, in each of which cases the fees and expenses of counsel for the Indemnitee shall be at the expense of the Corporation, except as otherwise expressly provided by this Article. The Corporation shall not be entitled, without the consent of the Indemnitee, to assume the defense of any claim brought by or in the right of the Corporation or as to which counsel for the Indemnitee shall have reasonably made the conclusion provided for in clause (ii) above.

5. Advance of Expenses. Subject to the provisions of Section 6 below, in the event that the Corporation does not assume the defense pursuant to Section 4 of this Article of any action, suit proceeding or investigation of which the Corporation receives notice under this Article, any expenses (including attorneys' fees) incurred by an Indemnitee in defending a civil or criminal action, suit, proceeding or investigation or any appeal therefrom shall be paid by the Corporation in advance of the final disposition of such matter, provided, however, that the payment of such expenses incurred by an Indemnitee in advance of the final disposition of such matter shall be made only upon receipt of an undertaking by or on behalf of the Indemnitee to repay all amounts so advanced in the event that it shall ultimately be determined that the Indemnitee is not entitled to be indemnified by the Corporation as authorized in this Article. Such undertaking may be accepted without reference to the financial ability of such person to make such repayment.

6. Procedure for Indemnification. In order to obtain indemnification or advancement of expenses pursuant to Section 1, 2, 3 or 5 of this Article, the Indemnitee shall submit to the Corporation a written request, including in such request such documentation and information as is reasonably available to the Indemnitee and is reasonably necessary to determine whether and to what extent the Indemnitee is entitled to indemnification or advancement of expenses. Any such indemnification or advancement of expenses shall be made promptly, and in any event within 60 days after receipt by the Corporation of the written request

of the Indemnitee, unless with respect to requests under Section 1, 2 or 5 the Corporation determines within such 60-day period that the Indemnitee did not meet the applicable standard of conduct set forth in Section 1 or 2, as the case may be. Such determination shall be made in each instance by (a) a majority vote of a quorum of the directors of the Corporation consisting of persons who are not at that time parties to the action, suit or proceeding in question ("disinterested directors"), (b) if no such quorum is obtainable, a majority vote of a committee of two or more disinterested directors, (c) a majority vote of a quorum of the outstanding shares of stock of all classes entitled to vote for directors, voting as a single class, which quorum shall consist of stockholders who are not at that time parties to the action, suit or proceeding in question, (d) independent legal counsel (who may be regular legal counsel to the Corporation), or (e) a court of competent jurisdiction.

7. Remedies. The right to Indemnification or advances as granted by this Article shall be enforceable by the Indemnitee in any court of competent jurisdiction if the Corporation denies such request, in whole or in part, or if no disposition thereof is made within the 60-day period referred to above in Section 6. Unless otherwise required by law, the burden of proving that the Indemnitee is not entitled to indemnification or advancement of expenses under this Article shall be on the Corporation. Neither the failure of the Corporation to have made a determination prior to the commencement of such action that indemnification is proper in the circumstances because the Indemnitee has met the applicable standard of conduct, nor an actual determination by the Corporation pursuant to Section 6 that the Indemnitee has not met such applicable standard of conduct, shall be a defense to the action or create a presumption that the Indemnitee has not met the applicable standard of conduct. The Indemnitee's expenses (including attorneys' fees) incurred in connection with successfully establishing his right to indemnification, in whole or any part, in any such proceeding shall also be indemnified by the corporation.

8. Subsequent Amendment. No amendment, termination or repeal of this Article or of the relevant provisions of the General Corporation Law of Delaware or any other applicable laws shall affect or diminish in any way the rights of any Indemnitee to indemnification under the provisions hereof with respect to any action, suit, proceeding or investigation arising out of or relating to any actions, transactions or facts occurring prior to the final adoption of such amendment, termination or repeal.

9. Other Rights. The indemnification and advancement of expenses provided by this Article shall not be deemed exclusive of any other rights to which an Indemnitee seeking indemnification or advancement of expenses may be entitled under any law (common or statutory), agreement vote of stockholders or disinterested directors or otherwise, both as to action in his official capacity and as to action in any other capacity while holding office for the Corporation, and shall continue as to an Indemnitee who has ceased to be a director or officer, and shall inure to the benefit of the estate, heirs, executors and administrators of the Indemnitee. Nothing contained in this Article shall be deemed to prohibit, and the Corporation is specifically authorized to enter into, agreements with officers and directors providing indemnification rights and procedures different from those set forth in this Article. In addition, the Corporation may, to the extent authorized from time to time by its Board of Directors, grant indemnification rights to



other employees or agents of the Corporation or other persons serving the Corporation and such rights may be equivalent to, or greater or less than, those set forth in this Article.

10. Partial Indemnification. If an Indemnitee is entitled under any provision of this Article to indemnification by the corporation for some or a portion of the expenses (including attorneys' fees), judgments, fines or amounts paid in settlement actually and reasonably incurred by him or on his behalf in connection with any action, suit, proceeding or investigation and any appeal therefrom but not, however, for the total amount thereof, the Corporation shall nevertheless indemnify the Indemnitee for the portion of such expenses (including attorneys, fees), judgments, fines or amounts paid in settlement to which the Indemnitee is entitled.

11. Insurance. The Corporation may purchase and maintain insurance, at its expense, to protect itself and any director, officer, employee or agent of the Corporation or another corporation, partnership, joint venture, trust or other enterprise (including any employee benefit plan) against any expense, liability or loss incurred by him in any such capacity, or arising out of his status as such, whether or not the Corporation would have the power to indemnify such person against such expense, liability or loss under the General Corporation Law of Delaware.

12. Merger or Consolidation. If the Corporation is merged into or consolidated with another corporation and the Corporation is not the surviving corporation, the surviving corporation shall assume the obligations of the Corporation under this Article with respect to any action, suit, proceeding or investigation arising out of or relating to any actions, transactions or facts occurring prior to the date of such merger or consolidation, or the merger or consolidation itself.

13. Savings Clause. If this Article or any portion hereof shall be invalidated on any ground by any court of competent jurisdiction, then the Corporation shall nevertheless indemnify each Indemnitee as to any expenses (including attorneys' fees), judgments, fines and amounts paid in settlement in connection with any action, suit, proceeding or investigation, whether civil, criminal or administrative, including an action by or in the right of the Corporation, to the fullest extent permitted by any applicable portion of this Article that shall not have been invalidated and to the fullest extent permitted by applicable law.


14. Definitions. Terms used herein and defined in Section 145(h) and Section 145(i) of the General Corporation Law of Delaware shall have the respective meanings assigned to such terms in such Section 145(h) and Section 145(i).

15. Subsequent Legislation. If the General Corporation Law of Delaware is amended after adoption of this Article to expand further the indemnification permitted to Indemnitees, then the Corporation shall indemnify such persons to the fullest extent permitted by the General Corporation Law of Delaware, as so amended.

Jun. 24. 1999 10:56AM Vitis Networks

No. 0527 P. 5/14

IN WITNESS WHEREOF, this Amended and Restated Certificate of Incorporation has been signed by the President & COO of the Corporation this 23 day of June, 1999.

  
Greg DeMund, President & COO